

REMARKS

A. Election With Traverse

In response to the restriction requirement mailed 21 May 2007 in which it is alleged that three species of the invention are presented in the application, Applicant elects with traverse to pursue prosecution of species I (Figs. 2, 3, 5 and 6). Applicant respectfully traverses the restriction requirement for the reasons discussed below and requests reconsideration of the restriction requirement and that the restriction requirement be withdrawn. It is believed that claims 1-11 and 17-25 read-on the elected species.

B. Propriety of the Restriction Requirement Has Not Been Established

Section 1.141 of Title 37 of the Code of Federal Regulations confers a right, in limited situations, upon Applicants to pursue claims defining multiple independent and distinct inventions in a common patent application for claims defining multiple species of an invention. See 37 C.F.R. §1.141. To ensure that Applicants are conferred the rights of 37 C.F.R. §1.141, the authority of the Office to require Applicants to elect one of multiple species for prosecution on the merits is limited to those situations where (a) reasons, as distinguished from the mere statement of conclusions, are provided in the restriction requirement as to why each invention as claimed is either independent or distinct, and (b) reasons are provided as to why there would be a serious burden on the Office were the restriction not required. See M.P.E.P. §808. Moreover, pursuant to M.P.E.P. §808.01, a requirement to elect one of multiple species for prosecution must set forth the reasoning in support thereof. A conclusory statement that the patentably distinct species are present is insufficient to bolster the propriety of a restriction requirement. See *id.*

In the instant application, there is a dearth of reasoning in support of the conclusory allegation that the application contains three patentably distinct species of an invention. Additionally, there are no allegations recited in the restriction requirement that searching the subject matter that is alleged to present three patentably distinct species would be a serious burden on the Office. Therefore, Applicant contends that, based upon the foregoing, the propriety of the restriction requirement has not been demonstrated in the restriction requirement. Applicant requests reconsideration of the restriction requirement and that the same be withdrawn.

Applicant notes that the Office action alleges that there is currently no generic claim in the present application. Applicant contends that claim 1 as originally presented is generic. Based upon the foregoing, Applicant respectfully requests that the restriction requirement be withdrawn.

C. Undue Prejudice

Finally, Applicant traverses the restriction requirement on the basis that the identification of species based upon figures unduly prejudices the Applicant by limiting the scope of protection of any of the elected species. Should any of the current claims, or any claims added later in prosecution, be deemed by the Patent Office or a court to be read under 35 U.S.C. 112, paragraph 6, then those claims would be potentially limited to the embodiment shown in the elected figure. However, election of a species based on a set of figures, where all other species are also identified by remaining sets of figures, has the effect of "removing" from the specification all sets of figures not identified as being a part of the elected species. In the present case, under the current restriction requirement, if the Applicant elects any one of the sets of figures, the embodiments in the remaining sets of figures would be effectively removed from the scope of Claims alleged to read-on the set of figures elected. For at least these reasons, the Applicant

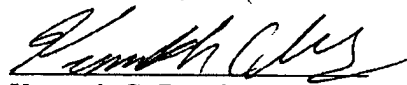
respectfully requests reconsideration of the restriction requirement and that the same be withdrawn.

The Commissioner is hereby authorized to charge any additional fees or credit any overpayment to Deposit Account 50-2811.

Respectfully submitted,

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I hereby certify that this paper (along with any paper referred to as being attached or enclosed) is being electronically transmitted or deposited with the United States Postal Service on the date shown below with sufficient postage as first class mail in an envelope addressed to the Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450, on

Date: January 3, 2008

By: 

Jan Steele